84-1775

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Case No. _____

UNITED STATES SUPREME COURT

1985 Term

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

vs.

SANTANO CORONEL-QUINTANA, A/K/A
SANTANA CORONEL-QUINTANA,

Defendant-Petitioner.

On Appeal from the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Petitioner requests a Writ of Certiorari based on the following important questions of federal law which should be settled by the United States Supreme Court or have been decided in conflict with applicable decisions of the United States Supreme Court.

1. Whether the denial of the petitioner's motion for translation of the voir dire proceedings abrogated his right to be present at every stage of his trial and his right to assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution.

2. Whether the trial court's denial of the petitioner's motion for continuance or dismissal based on the failure to preserve a record of the preliminary hearing was a denial of his constitutional right to due process as guaranteed by the Fifth Amendment to the United States Constitution.

3. Whether the trial court's denial of a defense motion for production of the confidential informant as a potential witness denied petitioner his Sixth Amendment right to confront witnesses against him and to a fair trial.

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OPINIONS OF THE LOWER COURTS

The case was submitted to the United States Court of Appeals for the Eighth Circuit on oral argument on December 13, 1984. An opinion was filed by the Court on January 16, 1985. An order denying the Petition for Rehearing was entered on February 21, 1985.

JURISDICTIONAL BASIS

Jurisdiction of the United States Supreme Court is invoked on the following grounds:

The Judgment and Commitment Order of the United States District Court of North Dakota, Northeastern Division, was filed May 21, 1984. The opinion of the United States Court of Appeals for the Eighth Circuit was filed on January 16, 1985 and an Order denying the Petition of Rehearing was entered on February 21, 1985. The statutory provision conferring jurisdiction on the United States Supreme Court by writ of certiorari is 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V

2. AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI

3. 28 U.S.C. §1827 (see Appendix for text)

STATEMENT OF THE CASE

Petitioner Santana Coronel-Quintana was charged on three counts of an eleven count indictment as follows:

> Count 5 - Knowingly, intentionally and unlawfully distributing approximately 176.78 grams of heroin, a Schedule I narcotic controlled substance, in violation of 21 U.S.C. §841 (a) (1) and 18 U.S.C. §2 together with four other defendants;
>
> Count 10 - unlawfully carrying a firearm during the commission of a felony in violation of 18 U.S.C. §924 (c) (2); and
>
> Count 11 - conspiring and agreeing to distribute and possessing with intent to distribute heroin in violation of 21 U.S.C. §846.

Santana Coronel-Quintana was indicted with four co-defendants, two of whom, Carmen Rodriguez and Jesus Coronel-Quintana, subsequently pleaded guilty. Petitioner was tried jointly with Inocencio Coronel and Andres Quintana-Diaz.

The circumstances leading to the arrest of Santana Coronel-Quintana began when two government agents met and debriefed a government informer, later identified as

Carlos Perez. The informer offered the agents information on drug trafficking in the Grafton, North Dakota area and agreed to work with the agents in setting up a drug transaction. The informer then arranged a meeting between the agents and Carmen Rodriguez which resulted in a heroin transaction being set up with Carmen Rodriguez as the "middleman". The transaction was to be completed at the Ramada Inn in Grand Forks, North Dakota and the Super 8 Motel in Grafton, North Dakota in December 1983. Throughout the negotiations, the government informer, Carlos Perez, arranged and attended meetings. He was also present in the motel room in Grafton, North Dakota where the transaction was to be completed. A pre-trial defense motion for production of the informer as a potential witness was denied.

A preliminary hearing in the case was held on January 6, 1984. The hearing was tape-recorded, but the tape was found to be

largely unintelligible a few days before trial. A defense motion for a continuance or dismissal based on failure to preserve the record of the preliminary hearing was denied.

The primary language of Petitioner Santana Coronel-Quintana as well as that of co-defendant Andres Quintana-Diaz is Spanish. For that reason, a certified court interpreter was provided for translation of the testimony in the case. However, a defense motion for translation of the voir dire proceedings was denied.

Santana Coronel-Quintana and Inocencio Coronel were found guilty of the charges. Andres Quintana-Diaz was acquitted. Santana Coronel-Quintana was sentenced on May 21, 1984 to 15 years on each of Counts 5 and 11 plus three years of special parole on Count 5 and 5 years on Count 10; all to run concurrently.

Jurisdiction of the Court of Appeals was invoked under 28 U.S.C. §1291.

ARGUMENT

I.

DENIAL OF THE PETITIONER'S MOTION FOR TRANSLATION OF THE VOIR DIRE PROCEEDINGS ABROGATED HIS RIGHT TO BE PRESENT AT EVERY STAGE OF TRIAL AND HIS RIGHT TO ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Santana Coronel-Quintana was born in Mexico. His native language is Spanish. Although he has lived in the United States for several years, his understanding and use of the English language is very limited. Co-defendants Jesus Coronel-Quintana and Andres Diaz-Quintana have similar language problems.

Due to these problems, a certified interpreter was provided for the translation of testimony at trial. The appellant moved the court for translation of voir dire proceedings but the motion was denied.

It has long been settled that a

defendant has the right to be present at every stage of a proceeding against him. Lewis vs. United States, 146 U.S. 370 (1892). The presence of the accused is required from the beginning of the selection of the jury through the verdict and discharge of the jury. Phillips vs. United States, 533 F.2d 369 (8th Cir. 1976), cert. denied 429 U.S. 924. In addition, Federal Rule of Criminal Procedure 43(a) states that the defendant shall be present at every stage of the trial including impaneling of the jury. Further, it has been held that the defendant's right to be present during jury selection is so basic to a fair trial that the infraction thereof could never be treated as harmless error. United States vs. Crutcher, 405 F. 2d 239 (2d Cir. 1968), cert. denied 394 U.S. 908.

Inherent in the defendant's right to be present at all stages of trial is his Sixth Amendment right to the assistance of

counsel. If the right to consult with and obtain the services of counsel is to have any meaning, a defendant's ability to understand the proceedings and to communicate with counsel is essential.

In recognition of these essential rights, Congress passed the Court Interpreter's Act which went into effect in 1978. That legislation is found at 28 U.S.C. §1827. The Court Interpreter's Act requires a presiding judicial officer to use a certified interpreter when that officer determines that a party speaks only or primarily a language other than English "so as to inhibit such party's comprehension of the proceedings or communication with counsel. . .". The interpretation may be waived by the individual involved on the record after the right has been explained and the individual has been given an opportunity to consult with counsel. Certain findings regarding the issue must be made on the

record.

Since its enactment, the Court Interpreter's Act has been cited in United States v. Tapia, 631 F.2d 1207 (5th Cir. 1980). In that case a remand was issued because the requisite findings on the record had not been made.

The Act has not been specifically applied to voir dire proceedings. It is clear, however, that those proceedings are critical stages of trial and we urge the court to recognize that the right to be present without the concomitant right to understand is no right at all. A finding that the petitioner was in need of a certified interpreter should be carried over to all critical stages of trial.

II.

THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION FOR CONTINUANCE OR DISMISSAL BASED ON THE FAILURE TO PRESERVE A RECORD OF THE PRELIMINARY HEARING WAS A DENIAL OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A preliminary hearing in petitioner's case was held on January 6, 1984. Although the hearing was tape recorded, the tape was largely unintelligible and was found to be of no use for trial purposes. The government's chief witness, Special Agent Charles F. Lee, testified at length at that hearing. At trial he testified inconsistently with his testimony at the preliminary hearing regarding the source of the heroin. He also made other admissions at the preliminary hearing. A defense motion for continuance or dismissal based on the failure to preserve the preliminary hearing testimony was denied.

Federal Rule of Criminal Procedure 5.1 (c) provides for making a record of the preliminary hearing. The rule further provides that the record may be made available to defense counsel. The value of the transcript of a preliminary hearing has been recognized both for purposes of discovery and as a tool for impeachment at

trial. Britt v. North Carolina, 404 U.S. 226 (1971); Brooks v. Edwards, 396 F. Supp. 662 (W.D.N.C. 1974).

In the instant case the petitioner clearly suffered prejudice through the failure to preserve the preliminary hearing record. The case against him was entirely circumstantial. It was constructed from hearsay statements by a government informer, speculation by government agents as to the source of narcotics and telephone bills showing calls made to a residence where several individuals resided. Clearly, had defense counsel been able to use the record of the preliminary hearing as a tool for impeaching the government's chief witness, the case for the defense would have been strengthened. A reasonable doubt as to petitioner's participation would have been raised.

A continuance would have enabled defense counsel to spend the necessary time to transcribe those parts of the tape that

may have been intelligible. Although the parties had been granted adequate time for trial preparation, it was not until shortly before trial that the tapes were found to be unintelligible. A continuance of a few hours would not have seriously delayed the case or disadvantaged the prosecution. Because the continuance or, in the alternative dismissal, was denied, a new trial is warranted.

III.

THE TRIAL COURT'S DENIAL OF A DEFENSE MOTION FOR PRODUCTION OF THE CONFIDENTIAL INFORMANT AS A POTENTIAL WITNESS DENIED PETITIONER HIS SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM AND TO A FAIR TRIAL.

The case against the defendants was set up by the government's confidential informant. This informant not only introduced the government agents to the alleged drug traffickers but also arranged and was present at meetings, allowed contacts to be made through his home telephone, provided the initial drug sample and was present in the Grafton motel room where the final

transaction was to have been consummated.

The general rule is that the prosecution in a criminal case may be allowed to withhold the identity of an informer in some cases. The test is one of balancing the public's interest in the free flow of information against the defendant's right to prepare his defense. Disclosure depends upon the facts of each individual case. Roviaro v. United States, 353 U.S. 53 (1957); United States v. Barnes, 486 F.2d 776 (8th Cir. 1973).

It is well established that where the informant is an active participant or a witness to the offense charged disclosure of the name and whereabouts of the witness will almost always be material. Roviaro v. United States, 353 U.S. 53 (1957); United States v. Barnes, 486 F.2d 776 (8th Cir. 1973). There can be no question but that the instant case falls within the rule stated in Roviaro.

Petitioner's counsel was able to de-

duce the identity of the government's informant. However, the informant's whereabouts were not known. Counsel had been given information that the informant, Carlos Perez, had been staying at the home of the police chief in Rugby, North Dakota. When he placed a telephone call to that number, he was informed that Perez was not there but would return his call. A short time later someone identifying himself as Perez called and stated he was in Texas. He further stated that if counsel wanted to speak with him he would have to go through the District Attorney. It is clear that Perez was being protected by the government. A defense motion for disclosure was denied in reliance on the false characterization of Perez as a mere "tipster" by the government.

Further, the informant was in effect allowed to testify over defense counsel's hearsay objection through the admission of statements he made to agents. Those statements were extremely prejudicial and were a

clear denial of petitioner's constitutional right to confront witnesses against him. That Sixth Amendment right allows a jury to observe the demeanor of a witness and to reach a decision about that witness's credibility. The accused is also allowed to confront that witness through cross-examination. In this case, cross-examination of Perez would have shown his motives in implicating Santana and in other ways exculpated the petitioner. Further, the informant would have been testifying under oath which provides the sanction of perjury charges where false testimony is discovered. He was the only other person present during several of the events leading to the arrest of petitioner who could have shed light on and undoubtedly discredited the testimony of the agents.

Because the result of denying disclosure of the government informant's name and whereabouts resulted in a denial of the petitioner's Fifth and Sixth Amendment

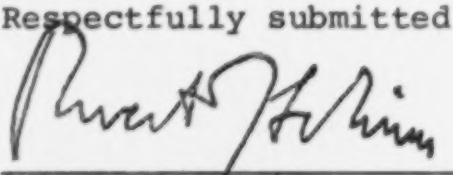
rights, a new trial is mandated.

CONCLUSION

Based on the foregoing arguments, Santana Coronel-Quintana believes there are important questions of federal law which should be settled by the United States Supreme Court or have been decided in conflict with applicable decisions of the United States Supreme Court. He respectfully requests a Writ of Certiorari.

DATED:
April 19, 1985

Respectfully submitted,



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ATTORNEY FOR DEFENDANT-PETITIONER

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 84-1699

United States of America, *
*
Appellee, *
*
v. *
*
*
Santano Coronel-Quintana, *
a/k/a Santana Coronel-. *
Quintana, *
*
Appellant. *

Appeals from the United States District Court for the District of North Dakota.

No. 84-1700

United States of America, *
*
Appellee, *
*
v. *
*
Inocencio Coronel, *
*
Appellant. *

Submitted: December 13, 1984

Filed: January 16, 1985

Before HEANEY, ROSS and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

Santana Coronel-Quintana was convicted of knowingly, intentionally, and unlawfully distributing heroin in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, conspiring to distribute heroin in violation of 21 U.S.C. § 846, and unlawfully carrying a firearm during the commission of a felony in violation of 18 U.S.C. § 924(c)(2). He received a total sentence of fifteen years

plus three years special parole.[1] Inocencio Coronel was convicted of the same offenses as Santana, as well as attempting to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846, receiving a firearm transported through interstate commerce in violation of 18 U.S.C. § 922(h), and illegal reentry into the United States after deportation in violation of 8 U.S.C. § 1326. He received a total sentence of twenty-seven years plus ten years special parole.[2] Both defendants

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[1]Santana was sentenced to fifteen years plus three years special parole for the distribution conviction, fifteen years for the conspiracy conviction, and five years for carrying a firearm during the commission of a felony. All three sentences were to run concurrently.

[2]Inocencio was sentenced to fifteen years plus ten years special parole for the heroin distribution conviction and fifteen years each for conspiring to distribute heroin and attempting to distribute cocaine. These three sentences were to run concurrently. He received a ten-year sentence for carrying a firearm during the commission of a felony and a five-year sentence for receiving a firearm through interstate commerce as a felon. These sentences were to run concurrent, but consecutively with the fifteen-year sentences. Inocencio also was sentenced to two years for illegal reentry after deportation. This sentence was to run consecutively with the other sentences.

raise numerous claims for reversal which we discuss in seriatim.

I. BACKGROUND.

This appeal arises from the defendants' participation in an illegal drug transaction in North Dakota. A confidential informant met with two drug enforcement agents and offered to supply them with information concerning drug trafficking in the Grafton, North Dakota, area. The informant named three brothers, Inocencio Coronel, Jesus Coronel-Quintana, and Santana Coronel-Quintana as potential contacts, and Carmen Rodriguez as the "middleman." The agents opened a file on these men and arranged a "sting" operation. The informant introduced the agents to Rodriguez, who told them that he could supply them with heroin and cocaine purchased in California, and that he knew two men in the Grafton area who could also supply them with these drugs. (Tr. 18) Through a series of telephonic negotiations, which were recorded by the government agents,

the initial purchase was scheduled for November 30, 1983. Jesus's supplier told him that the deal looked too suspicious and backed out of the deal. (Tr. 701) The agents remained in contact with Rodriguez, however, and a purchase was scheduled for December 22, 1983. This transaction resulted in the arrests of Santana, Inocencio, Jesus, Rodriguez, and Andres Diaz-Quintana.[3]

II. DISCUSSION.

A. Denial of Continuance.

Santana and Inocencio contend that the district court erred in denying their motion for a continuance when it was discovered that the preliminary hearing recording was not transcribable. They argue that, because the district court denied their motion for a continuance so they might transcribe the

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[3]Both Jesus Coronel-Quintana and Carmen Rodriguez pled guilty to the charges against them. Andres Diaz-Quintana was acquitted of the charges against him.

tape, they were deprived of their right to effectively cross-examine and impeach one of the government's undercover agents. Apparently, the agent testified at the preliminary hearing that he was unsure of the heroin source but later testified at trial that Santana was the source of the heroin. (Tr. 157)

Because a trial judge must balance a number of considerations in determining whether or not to grant a continuance, he must be afforded substantial discretion, United States v. Little, 567 F.2d 346, 348-49 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978), and denial of a continuance will constitute reversible error only if the judge clearly abuses this discretion. United States v. Reed, 658 F.2d 624, 627 (8th Cir. 1981), cert. denied, 455 U.S. 1002 (1982); United States v. Wolf, 645 F.2d 665, 667 (8th Cir. 1981). In Little, this Court noted the following five factors that the trial judge must consider in determining

whether to grant a continuance:

> 1) the nature of the case and whether the parties have been allowed adequate time for trial preparation;
>
> 2) the diligence of the party requesting the continuance;
>
> 3) the conduct of the opposing party and whether a lack of cooperation has contributed to the need for a continuance;
>
> 4) the effect of the continuance and whether a delay will seriously disadvantage either party;
>
> 5) the asserted need for the continuance, with weight to be given sudden exigencies and unforeseen circumstances.

United States v. Bernhardt, 642 F.2d 251, 252 (8th Cir. 1981) (citing Little, 567 F.2d at 348-49).

The defendants were given copies of the tapes prior to trial, and had an opportunity to listen to them and obtain whatever information they could from them. A continuance would not have solved the problem of the discrepant testimony because the tapes were simply unintelligible. Moreover, the defendants' counsel were at the preliminary hearing, and therefore were fully aware of the discrepancies in the agent's testimony. They could have brought out this discrepancy

during cross-examination under Rule 613 of the Federal Rules of Evidence without the preliminary hearing transcript, yet they failed to do so. Thus, reviewing the record in light of the factors listed in Little, we conclude that the district court did not abuse its discretion in denying the defendants' motion for a continuance.

B. Production of the Confidential Informant.

In their pretrial motions, the defendants moved for disclosure of the identity of the government's confidential informant, Carlos Perez. Relying on the prosecution's statement that Perez was a "mere tipster", the district court denied their motion. The defendants argue that the district court erred in denying their motion and, as a result, they were denied an opportunity to develop an entrapment defense. They also contend that Perez had evidence that would have substantially impeached the credibility of the prosecution's witnesses. Although it

is apparent from the record that Perez actively participated in the transaction and therefore was more than a "mere tipster", we find that there was no denial of due process under these circumstances.

In United States v. Barnes, 486 F.2d 776, 778-79 (8th Cir. 1973), we noted that where the informant was "an active participant or witness to the offense charged, disclosure will almost always be material to the accused's defense". Id. at 779. See also United States v. Bruneau, 594 F.2d 1190, 1197 (8th Cir.), cert. denied, 444 U.S. 847 (1979). However, even if we conclude that the government should have disclosed the confidential informant's identity prior to trial, the defendants suffered no material prejudice from the government's failure to do so. It is clear from the record that the defendants knew the informant's name and where he was residing before trial. Moreover, the defendants knew that Perez was present throughout the negotiations and during the

transaction, and could have subpoenaed him if they believed he had evidence that would have exonerated them. Yet they did not do so.[4] Therefore, we conclude that they suffered no prejudice from the denial of the their motion to disclose. See e.g., Bruneau, 594 F.2d at 1197-98; United States v. DeAngelis, 490 F.2d 1004, 1010 (2d Cir.), cert. denied, 416 U.S. 956 (1974).

C. Severance.

Santana and Inocencio argue that the district court abused its discretion in denying their motions for severance. However, neither defendant renewed his motion for severance at the close of the government's case nor at the conclusion of all the evidence, and therefore they waived their request for a separate trial. United States v. Reed, 658 F.2d at 629; United States v. Brim, 630 F.2d 1307, 1310 (8th Cir. 1980), cert denied, 452

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[4]Santana's attorney learned that Perez was the informant prior to trial, and telephoned him at the home of the chief of police in Rugby, North Dakota. He was told by Perez

U.S. 966 (1981). In any event, denial of their motions for severance was not error. "The general rule is that persons charged in a conspiracy should be tried together, particularly where proof of the charges against the defendants is based upon the same evidence and acts." United States v. Lee, 743 F.2d 1240, 1248 (8th Cir. 1984). See also United States v. Krevsky, 741 F.2d 1090, 1094 (8th Cir. 1984); United States v. Miller, 725 F.2d 462, 467 (8th Cir. 1984). "A defendant must show more than that his chances for acquittal would have been greater had he been tried separately." Lee, 743 F.2d at 1248. Rather, the defendant must show that he was prejudiced by the denial for severance, and this prejudice

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that he would have to go through the district attorney if he wanted to speak to Perez. However, the defendant took no further action to produce Perez.

must be "clear" and "real". Miller, 725 F.2d at 467.

The defendants argue that, because they were not charged in all counts of the indictment and because the amount of evidence concerning each defendant's participation in the transaction was disproportionate, the jury was unable to separate the evidence and consider each defendant individually. This argument is without merit. The fact that Andres Diaz-Quintana, who was tried with Santana and Inocencio, was acquitted of all charges against him attests to the jury's diligence in considering each defendant's case individually.

Santana also argues that he was prejudiced by the denial for severance because Inocencio would have testified on Santana's behalf had they been tried separately. Inocencio chose not to testify at trial because information that would have been highly prejudicial to him would have been

admitted into evidence.[5] However, we cannot say that Santana suffered any clear and real prejudice. Santana does not indicate what Inocencio could have testified and how that testimony would have exonerated him. Moreover, both Jesus Quintana and Carmen Rodriguez testified that Santana was not a part of the conspiracy, yet the jury apparently chose not to believe this testimony. Therefore, we conclude that the district court did not abuse its discretion in denying the defendants' motion for severance.

D. Motion in Limine.

Inocencio initially intended to testify concerning his involvment in the heroin sale. Because he feared that the details surrounding a prior conviction would be brought out on cross-examination, however, and because these details were extremely

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[5]See infra at part D.

prejudicial to Inocencio's defense[6], Inocencio sought to limit the prosecution's inquiry to the fact of his convictions and preclude any inquiry into the circumstances surrounding these convictions. The district court denied this request and Inocencio did not testify. Inocencio contends that the district court's ruling effectively precluded him from testifying on his own behalf and that the district court abused its discretion because the details of the prior conviction were not probative to any of the elements or issues of the crimes charged.

The Supreme Court recently held that "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." Luce v.

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[6]In 1976, Inocencio pled guilty to charges of selling heroin and assault on a police officer with a deadly weapon. Both charges arose from a narcotics transaction in California. After the narcotics and money had been exchanged, the undercover officer drew his weapon, identified himself as a police officer, and ordered Inocencio to place his hands on the dashboard of the car. Inocencio drew a pistol

United States, 53 U.S.L.W. 4007, 4009 (U.S. Dec. 10, 1984). Under Federal Rule of Evidence 609(a)(1), a court may prohibit the introduction of a witness's prior conviction for the purpose of attacking the witness's credibility if the court determines that the probative value of admitting this evidence is outweighted by the evidence's prejudicial effect to the defendant. When the defendant does not testify, however, a reviewing court does not have the precise nature of the defendant's testimony, and "(a)ny possible harm from the district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative." Id. at 4008.

E. Sentencing

Inocencio next contends that, although the sentence he received was within the

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from the console next to his car seat and shot the police officer.

statutory limits, the district court abused its discretion in fixing the sentence by considering materially false information. At the time Inocencio was sentenced, the district court stated:

> This length sentence has been imposed on you, Mr. Coronel, because the record is very clear (that) you are a very dangerous individual and you have demonstrated a willingness to kill to achieve your objectives and the only way that people can be protected from someone with your attitude and your willingness to commit crimes is to have you incarcerated.

Inocencio claims that the district court considered the allegedly perjured testimony of two government agents who testified that when they arrested him, Inocencio went for a loaded pistol hidden in the back waistband of his pants.

Although this Court will not substitute its judgment for that of the district court in questions of sentencing, United States v. Russell, 724 F.2d 725, 726 (8th Cir. 1984), a sentence imposed upon material misinformation or erroneous

assumptions violates due process. Townsend v. Burke, 334 U.S. 736, 740-41 (1948); United States v. Catch the Bear, 727 F.2d 759, 761 (8th Cir. 1984). However, we cannot say that the district court based Inocencio's sentence on materially false information because Inocencio's conclusory allegations of perjury do not prove that the agent's testimony was false. Moreover, the district court had evidence that Inocencio had previously been given a sentence of five years to life for shooting a police officer during an arrest for selling heroin in California. Thus, we conclude that the district court did not abuse its discretion in sentencing Inocencio.

F. Phone Monitoring.

Santana contends that the district court erred in denying his motion to dismiss the indictment when it learned that his telephone calls from the Grand Forks County Jail were being monitored. He alleges that these calls were confidential,

and that the monitoring impeded his right to consult with his attorney, thereby violating his fourth, fifth, and sixth amendment rights.

In United States v. Morrison, 449 U.S. 361 (1981), the Supreme Court specifically stated that, absent demonstrable prejudice or substantial threat of such prejudice, dismissal of the indictment is plainly inappropriate when an individual's fourth, fifth, or sixth amendment rights have been violated, and "(t)he remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression." Id. at 365-66. See also United States v. Solomon, 679 F.2d 1246 (8th Cir. 1982). Santana does not allege, nor can we conclude from the record, that any information gained from this monitoring was used by the prosecution against Santana. Accordingly, we find that the district court properly denied Santana's motion to dismiss the indictment.

G. Suppression.

Santana also argues that the district court erred in denying his motion to suppress a revolver seized from him in a search incident to his warrantless arrest. He alleges that the government agents had insufficient probable cause to arrest him without a warrant, and therefore the seizure violated his fourth amendment rights.

Following a hearing, the district court found that, considering the totality of the circumstances surrounding Santana's arrest, probable cause was clearly present. This finding may not be set aside unless it is clearly erroneous. United States v. Everroad, 704 F.2d 403, 405 (8th Cir. 1983); United States v. Childress, 721 F.2d 1148, 1150 (8th Cir. 1982), aff'd on rehearing, 715 F.2d 1313 (8th Cir. 1983), cert. denied, 104 S. Ct. 744 (1984). "The existence of probable cause to make a warrantless arrest depends upon 'whether, at the moment the

arrest was made, *** the facts and circumstances within (the arresting officer's) knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.'" United States v. Clark, 743 F.2d 1255, 1260 (8th Cir. 1984) (citations omitted). This determination must not rest on isolated facts, but rather on the cumulative effect of the facts in the totality of the circumstances. Everroad, 704 F.2d at 406.

The government agents based their belief that probable cause existed to arrest Santana on (1) the informant's tip that Santana would transport the heroin to North Dakota from the West Coast; (2) a telephone conversation between the agents and Carmen Rodriguez in which Rodriguez substantially confirmed that Santana was the source of the heroin; (3) the informant's tip that Santana was armed and keeping the agents under surveillance as they were negotiating the

transaction at the Ramada Inn; and (4) the agents own observation that Santana and Andres were keeping them under surveillance. Viewing the facts in their totality, together with the rational inferences that may be drawn from them, we believe that the district court's ruling that the agents had probable cause to arrest Santana was not clearly erroneous. Accordingly, the district court properly denied Santana's motion to suppress the revolver seized incident to that arrest.

H. Voir Dire.

Santana next contends that the district court erred in denying his motion to have voir dire translated in Spanish. He argues that because voir dire was not translated, he could not effectively assist his counsel and, therefore, he was denied a fair trial and due process. We disagree.

The appointment of an interpreter lies within the sound discretion of the trial judge. 28 U.S.C. § 1827(d); United States v. Tapia, 631 F.2d 1207, 1210 (5th Cir. 1980).

Because the decision to appoint an interpreter will likely hinge upon a variety of factors, including the dependant's (sic) understanding of the English language, and the complexity of the proceeding, issues, and testimony, the trial court, being in direct contact with the defendant, should be given wide discretion, United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973), cert. denied, 416 U.S. 907 (1974), and this decision should not be disturbed unless the trial court clearly abuses its discretion. United States v. Salsedo, 607 F.2d 318, 320 (9th Cir. 1979); United States v. Sosa, 379 F.2d 525, 527 (7th Cir.), cert. denied, 389 U.S. 845 (1967). Our review of the record indicates no such abuse of discretion.

Santana had lived and worked in the United States for at least seven years. Because he once lived in the area from which the venire panel was selected, he wanted voir dire translated into Spanish so that if he knew someone, or if a name was mentioned

with which he was familiar, he could pass that name on to his counsel, and confer with him about the individual. However, we agree with the district court that translating the entire proceeding into Spanish was unnecessary. An interpreter was present throughout voir dire and was seated at the defendant's table. If Santana recognized someone on the venire panel, or a name was mentioned with which Santana was familiar, he could have consulted with his attorney through the interpreter. Moreover, if they had any other questions, the interpreter was readily available to him. Therefore, we conclude that the district court adequately protected Santana's right to be present and participate in the jury selection, and accordingly, we find no abuse of discretion in its refusal to translate the entire voir dire proceeding into Spanish.

I. Sufficiency.

The defendants' final allegation[7] is that the evidence was insufficient to support their convictions and, therefore, the district court erred in denying their motions for judgment of acquittal.

The defendants' convictions must be upheld if, viewing the evidence in the light most favorable to the government, there is substantial evidence to support the jury's verdict. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Hudson, 717 F.2d 1211, 1213 (8th Cir. 1983). In reviewing the jury's verdict, we give the government the benefit of all inferences that may reasonably be drawn from the evidence. Hudson, 717 F.2d at 1213; United States v. Richmond, 700 F.2d 1183, 1189 (8th Cir. 1983); United States v. Cox, 580 F.2d 317,

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[7]Santana also raises issues concerning remarks made during opening statement and closing argument. We have reviewed these issues and find them to be without merit.

323 (8th Dir. 1978), cert. denied, 439 U.S. 1075 (1979). Moreover, it is unnecessary that the evidence exclude every reasonable hypothesis except guilt; rather, the evidence must simply be sufficient to convince the jury beyond a reasonable doubt that the defendant is guilty. United States v. Bentley, 706 F.2d 1498, 1508 (8th Cir. 1983), cert. denied, 104 S. Ct. 2397 (1984); United States v. Richmond, 700 F.2d at 1189; United States v. Archambault, 670 F.2d 800, 801 (8th Cir. 1982). Finally, the essential elements of the charge may be proven by circumstantial, as well as direct evidence. Holland v. United States, 348 U.S. 121, 140 (1954); Hudson, 717 F.2d at 1213; Richmond, 700 F.2d at 1189. Viewing the evidence under these standards, we believe that the district court did not err in denying the defendants' motions for judgment of acquittal.

Concerning Inocencio's claim, we have no doubt that the evidence was sufficient to support the convictions. Our review of

the record indicates that there was ample evidence for the jury to find that he knowingly and actively participated in the heroin transaction, and also that he offered one of the agents what later proved to be cocaine.

Santana's claim, however, presents a much closer case. The prosecution's case against Santana showed that on December 1, 1983, the day after Carmen Rodriguez's source backed out of the initial transaction, a series of alternating telephone calls was made from Jesus's trailer to the undercover agents in Fargo, North Dakota, and to a number registered in Santana's name in California.[8] Jesus denied making these

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[8]Between 12:00 noon and 1:00 p.m., the following calls were made from Jesus's trailer:

1) At 12:00 noon, to the number registered under Santana's name in California lasting four minutes;

2) At 12:05 p.m., to the number of the undercover agents in Fargo lasting seven minutes;

3) At 12:24 p.m., a second call to the same number in California lasting eight minutes;

calls but testified "(t)hat must have been when Carmen was talking about buying drugs." The evidence also indicated that the heroin was to arrive in North Dakota from a West Coast source, and that this source needed fifteen to sixteen hours notice before delivery could be made in North Dakota.

Moreover, in a recorded telephone conversation between Rodriguez and the agents at 9:15 a.m. on December 22, 1983, Rodriguez stated that, although the heroin had not yet arrived, the persons transporting it had called "about an hour, an hour and a half ago" and, at that time, they were "maybe about five hours away." When one of the agents asked Rodriguez, "Who'd you talk to, Santana(?)" Rodriguez replied, "Ah, yeah." The record shows that Santana and Inocencio arrived from the West Coast sometime between 11:00 a.m.

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4) At 12:52 p.m., to the undercover agents in Fargo lasting six minutes; and
5) At 12:58 p.m., to the number in California lasting seventeen minutes.

and 12:00 noon that day.

In another recorded telephone coversation between an agent and Carlos Perez shortly after Santana and Inocencio arrived at Jesus's trailer, Perez told the agent that the heroin had arrived and it was in the automobile Santana had driven form the West Coast. Furthermore, Agent Kemmet testified that Inocencio stated he and Santana had trouble bringing the heroin into North Dakota due to bad weather.[9]

Santana argues that he was unaware that Jesus and Rodriguez were transacting a heroin sale, and that the only reason he went to the Grand Forks Ramada Inn that night was to celebrate the holidays with his brothers, Jesus and Andres. He alleges that Jesus told them he had something to attend to

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[9]The record shows that the day Santana and Inocencio arrived, the temperature was approximately thirty degrees below zero, and Santana was having trouble with his car due to the cold temperatures. Moreover, there is evidence in the record that the roads in the area were icy.

earlier in the evening, but that he would meet them at the Ramada Inn between 10:00 p.m. and 11:00 p.m. Although Santana and Andres arrived at the hotel around 4:00 p.m., Santana contends they went into the hotel early because they saw Jesus's car parked at the hotel and believed Jesus had finished his business early. However, Santana also testified that he knew Carmen Rodriguez and Carlos Perez had taken Jesus's car, and therefore Jesus would be driving another vehicle. Moreover, when Santana and Andres saw Rodriguez and Perez in the hotel lounge, neither one approached them to ask whether Jesus was at the hotel; rather, they ignored Rodriguez and Perez.

Finally, the two agents negotiating with Rodriguez testified that they observed Santana move about the hotel, keeping them under serveillance and that Rodriguez told them that the individuals who transported the heroin would have to count the money at the hotel before the transaction could be

made final.

Although this evidence linking Santana to the heroin transaction is primarily circumstantial, the elements of a crime may be proven by circumstantial as well as direct evidence. Holland, 348 U.S. at 140; Hudson, 717 F.2d at 1213; Richmond, 700 F.2d at 1189. Giving the government the benefit of all inferences that may be drawn from this evidence, we believe there is substantial evidence to support the jury's verdict.

Having found no error, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Relevant portions of 28 U.S.C. §1827

§1827. Interpreters in courts of the United States

(d) The presiding judicial officer, with the assistance of the Director of the Administrative Office of the United States Courts, shall utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise competent interpreter, in any criminal or civil action initiated by the United States in a United States district court (including a petition for a writ of habeas corpus initiated in the name of the United States by a relator), if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case), or a witness who may present testimony in such action-

(1) speaks only or primarily a language other than the English language; or

(2) suffers from a hearing impairment (whether or not suffering also from a speech impairment)

so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.

(f) Any individual other than a witness who is entitled to interpretation under subsection (d) of this section may waive such interpretation in whole or in part. Such a waiver shall be effective only if approved by the presiding judicial officer and made expressly by such individual on the record after opportunity to consult with counsel and after the presiding judicial officer has explained to such individual, utilizing the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise competent interpreter, the nature and effect of the waiver.